Supreme Court, U.S.
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No. 85-249

In The

Supreme Court of the United States

October Term, 1985

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a single isolated unconstitutional firing of a court clerk by a municipal judge possessing authority to hire and fire his employees establishes an official policy, custom, or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983.

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Petitioner City of Little Rock [hereafter City] respectfully requests that this Court overlook the inaccuracies of Respondent's Brief in Opposition, and grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The District Court did not issue an opinion in this matter. A copy of the judgment is included in the appendix of the Petition (A-1). The panel decision of the United States Court of Appeals is also included in the Appendix of the Petition (A-9). *Williams v. Butler*, 746 F.2d 431 (8th Cir. 1984). The Court divided evenly on rehearing *en banc*, so no additional opinion was rendered. A copy of the May 13, 1985, order affirming the District Court is included in the Appendix of the Petition (A-36). *Williams v. Butler*, 762 F.2d (8th Cir. 1985).

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

———o———

REASONS FOR GRANTING THE WRIT

There is tremendous confusion among the federal circuit courts of appeal as to what constitutes a policy, custom or practice by a municipality sufficient to render a municipality liable for damages pursuant to 42 U.S.C. § 1983. The City reiterates that this Court should grant this writ in order to resolve this conflict. S.Ct.R. 17.1(a).

———o———

STATEMENT OF THE CASE

The City reaffirms its original Statement of the Case.

———o———

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

———o———

ARGUMENT IN REPLY

(The City is numbering the paragraphs in this Reply Brief to correspond with the numbering in Williams' Brief in Opposition).

1. Williams erroneously asserts that this case is totally unlike *Pembaur v. Cincinnati,* 746 F.2d 337 (6th Cir. 1984), *cert. granted,* 105 S.Ct. 3475 (1985), because *Pembaur* does not involve a high level municipal official. Williams has evidently failed to read *Pembaur.*

The question in *Pembaur* is whether a single, discreet decision by a *policymaking* official constitutes governmental policy for purposes of liability pursuant to 42 U.S.C. § 1983. An extremely similar issue is presented here. The

officials in *Pembaur* are the elected County Prosecutor and the elected County Sheriff. The official here is the elected municipal judge [hereafter "Judge Butler"].

In both cases the "authority" granted the relevant officials is based upon state statutes. *Pembaur*, 746 F.2d at 341; *see also* Ark. Stat. Ann. §§ 22-701; -704.1 (Repl. 1962); -713; -713.1 (Repl. 1985). To be sure, in Arkansas a municipality is virtually helpless to deny a municipal judge the authority to hire the clerks of his choice.

Hence, even though the City Board of Directors permitted Judge Butler to hire and fire his clerks, it effectively lacked authority to do otherwise. In any event, it never granted him the authority to hire and fire his clerks in an unconstitutional manner. The unconstitutional firing in this case was an aberrant act that cannot be deemed to constitute an officially promulgated city policy.

The precise issue for certiorari is a legal question—i.e., does one aberrant act constitute an official municipal policy for purposes of liability pursuant to 42 U.S.C. § 1983? Williams' characterization of this question as a factual issue is both misleading and inaccurate.

The District Court ruled as a matter of law that this aberrant act constituted an officially promulgated municipal policy. (R. 494) The divided Eighth Circuit panel affirmed the District Court. The vacation of the panel decision by the *en banc* rehearing effectively reinstituted the District Court's legal ruling.

At the very least this case is exactly like *Pembaur* and should be held in abeyance pending a decision in that case. As noted below, because of the intentional nature of Judge Butler's misconduct, as opposed to the discretionary con-

duct in *Pembaur*, this case has an added element that requires direct plenary review by this Court.

2. Williams' assertion that there is no conflict among the Circuits on the issues involved in this case ignores reality. [See Respondent's Brief at 6]. The City notes initially that Williams has totally failed to address the direct conflict between the Eighth and the Seventh Circuits. *Compare, Williams v. Butler,* 746 F.2d 431 (8th Cir. 1985) with *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984) (intentional participation in a single conspiracy by an elected prosecutor held not the basis for municipal liability on a policy theory).

Further, *Williams* is in direct conflict with the Tenth Circuit by holding that one First Amendment violation is sufficient to establish a municipal policy. *Brown v. Reardon,* 770 F.2d 896, 901 (10th Cir. 1985) (one instance of illegal termination for failure to make a political contribution does not establish a municipal policy upon which to base municipal liability); *see also, Burkhart v. Randles,* 764 F.2d 1196, 1202 (6th Cir. 1985) (because of a *persistent* practice of First Amendment violations a county policy is established).

The cases cited in the initial petition have not been repeated here. But, it is clear that the Circuits are hopelessly in conflict on the issue of whether one act is sufficient to establish a municipal policy. This case provides the Court the opportunity to render a definitive answer to this question.

3. Williams finally suggests that this Court has ruled that one act can establish a municipal policy, custom or practice. [See Brief in Opposition at 8] The Court has not

answered that question. *City of Oklahoma v. Tuttle,* — U.S. —, 105 S.Ct. 2427 (1985), left that question open because an error in jury instructions made it unnecessary to decide the issue.

Even so, as this Court noted in *Polk v. Dodson County,* 454 U.S. 312 (1981), the official policy must be the "moving force" behind the constitutional tort. Here the moving force behind the tort was one man's abuse of power and not a municipal policy as Williams would like the Court to believe.

An aberrant act should not be held to establish official government policy. Three Circuits hold that it can. Three Circuits hold otherwise. [See Petition at 5-9]. This Court must resolve this conflict.

4. In *Pembaur* the trial court refused to base municipal liability on one act that was a matter of statutorily based discretion apparently made in good faith by a deputy prosecuting attorney and a deputy sheriff. In *Williams* the one act is a matter of statutorily based discretion being improperly exercised in a personal vendetta. In effect, Wiliams seeks to establish a *respondeat superior* basis of municipal liability. Because this Court has clearly held that *respondeat superior* is never a basis for § 1983 municipal liability, this Petition should be granted in order to extend that ruling to aberrant acts. *See Monell v. Department of Social Services,* 436 U.S. 658 (1978).

The City is being held liable, in essence, because of Judge Butler's intentional constitutional tort. This case will give this Court the opportunity to answer now whether municipalities can be held liable for acts of personal vendetta in the absence of ratification of such acts. *See*

Turpin v. Mailet, 619 F.2d 196 (2nd Cir.), *cert. denied*, 449 U.S. 1016 (1980).

CONCLUSION

The City reasserts its belief that this case should be granted review by the Court. At a minimum the Court should hold this matter in abeyance pending its decision in *Pembaur*. However, because of the added aspect of intentional misconduct for which there has been no ratification by the municipality, this Court should grant review and determine if such activity is ever the basis for municipal liability pursuant to 42 U.S.C. § 1983.

Respectfully submitted,

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